A Salary "Credit" Is Already "Permitted"

Insights
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The U.S. Labor Department's commentary regarding its proposed federal Fair Labor Standards Act Section 13(a)(1) exemption regulations said that it might "permit" employers to "count" or "credit" against the impending higher salary threshold unspecified "nondiscretionary bonuses and incentive payments" on some limited, to-be-identified basis. We summarized USDOL's statements in our prior post, including the agency's having said that it was disinclined to extend this "credit" to "commissions".

Many employers consider a salary "credit" to be imperative if they are to maintain exempt status for at least some employees who will be affected by an increased salary minimum. But what if there is *already* a way to accomplish much the same thing?

A Guaranteed Draw Or Advance

USDOL has recognized for decades that employers may satisfy these exemptions' salary requirement by paying a predetermined amount (of at least the minimum threshold) each pay period on a properly-maintained "salary basis" as a guaranteed draw or advance against incentive-based compensation. The agency has done so without regard to whether the incentive compensation might ultimately make up the entirety of the employee's pay.

As an illustration, assume that the new salary threshold is set at $970 per week. A hypothetical engineer who otherwise meets the FLSA "professional exemption" requirements is compensated based upon a percentage of the gross revenue generated by his or her projects completed during each calendar quarter.

As a part of this plan, the engineer receives a weekly guaranteed draw against the quarterly compensation at a rate of $970 per week. This draw is paid so as to comply with all of USDOL's "salary basis" requirements.

At the end of a calendar quarter, the engineer's draws paid are offset against the gross percentage of revenue generated, and he or she receives the excess (if any). The engineer never pays back any of the guaranteed draw (either during employment or at termination), such as if a deficit results when gross-revenue-percentage dollars are less than the total of the draws paid. Instead, the plan simply means that the engineer will not be due any additional compensation until the gross revenue produced exceeds a certain level.

In many ways, this is not distinguishable from the employer's "counting" 100% (rather than only USDOL's 10%) of the incentive compensation towards the salary necessary to maintain the engineer's FLSA exemption status. Neither is it necessary to reconcile the compensation at least monthly, a frequency that USDOL suggested it might impose for any regulatory "credit" mechanism.

Furthermore, the principles underlying such a plan would not call for a different outcome if the incentive amounts or other nondiscretionary compensation consisted of "commissions" (whatever USDOL meant by that).

The Bottom Line

Naturally, the details of how such pay plans are established and administered will be highly important to maintaining the necessary "salary basis" of pay. There might also be variations on this approach that would be more palatable to some employers.

And, as always, the applicable laws of other jurisdictions must also be taken into account.

But this alternative demonstrates that whether USDOL "permits" a "credit" of some kind in the revised regulations is not necessarily a be-all/end-all matter.